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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91210282
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**CERTIFICATE OF ELECTRONIC FILING**

I hereby certify that Opposer's Opposition to Applicant's Motion for Partial Judgment on the Pleadings is being filed with the TTAB via ESTTA on the date set forth below.

Date: July 11, 2014

/Leah Z. Halpert/  
Leah Z. Halpert

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

<b>RED BULL GMBH,</b>	)	<b>Consolidated Matter:     91-210,282</b>
<b>Opposer,</b>	)	Opposition No. 91-210,282 (Parent)
<b>v.</b>	)	Opposition No. 91-214,537 (Child)
<b>STOCKMARKET BURGER, INC.,</b>	)	<b>Marks:</b>
<b>Applicant.</b>	)	<b>Bull and Swirl Design</b> (#85/680,816)
	)	<b>STOCKMARKET &amp; Bull Design</b>
	)	(#85/969,820)
	)	<b>Serial Nos.:</b>
	)	<b>85/680,816</b>
	)	<b>85/969,820</b>

**OPPOSER'S OPPOSITION TO APPLICANT'S MOTION FOR  
PARTIAL JUDGMENT ON THE PLEADINGS**

Opposer, RED BULL GMBH ("Opposer") submits this brief in opposition to Applicant's Motion for Partial Judgment on the Pleadings ("MPJP").<sup>1</sup> As discussed herein, a review of the pleadings show that triable issues of fact remain, which, if taken as true, establish Opposer's entitlement to judgment. Accordingly, Opposer respectfully requests that Applicant's motion be denied in its entirety.

**PRELIMINARY STATEMENT**

Applicant's MPJP is a spurious attempt to delay the proceedings and avoid Applicant's clear discovery obligations. Applicant bases its MPJP on its own, unsupported opinion that the opposed marks of Appln. Nos. 85/680,816 and 85/969,820 ("Applicant's Bull Logo Marks") are

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<sup>1</sup> The MPJP goes entirely toward Opposer's claims of priority and likelihood of confusion. Despite the argument herein, should the Board agree with Applicant, Opposer respectfully requests leave to amend the Consolidated Notice of Opposition as necessary to proceed on Opposer's second claim of lack of bona fide intent to use.

not, as a matter of law, confusingly similar in appearance, sound and meaning alone to Opposer's RED BULL and Bull Logo Marks.

In support of its conclusion, Applicant erroneously attempts to limit the breadth of Opposer's RED BULL and Bull Logo Marks by inappropriately and mistakenly arguing that Opposer's relied-upon common law design marks should not be considered. If Applicant found the descriptions of Opposer's common law designs (admitted by Applicant to be famous for the purposes of the MPJP, *see* MPJP at 5) to be vague, the proper vehicle to challenge these descriptions was through a Motion for a More Definite Statement *before* filing its answer (or, in this case, its original answer to the Notice of Opposition in the Parent Opposition, its answer to the Amended Notice of Opposition in the Parent Opposition, and its answer to the Notice of Opposition in the Child Opposition). Claiming at this point that portions of the Amended Notice of Opposition are "ambiguous" and, as a result, the Applicant cannot form an appropriate responsive pleading to them (or, as Applicant puts it, cannot ascertain which mark the [relied-upon common law design marks] refer to based on the pleadings) is untimely and should be ignored in ruling on this motion. Clearly, Applicant was able to fully understand the pleadings as written, else the appropriate Motion would have been filed during one of the three opportunities Applicant had. Additionally, for the purposes of this motion, Applicant concedes that Opposer's Mark (all of them) are famous, indicating that, for the purposes of this motion, Applicant, admittedly in the exact same field of business, is well aware of Opposer's common law designs.

To support its argument on the merits, Applicant deliberately ignores factual allegations raised in the Complaints.<sup>2</sup> Rather, in an effort prejudice the Board against Opposer, Applicant's

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<sup>2</sup> The operative pleadings are Opposer's Amended Notice of Opposition, Docket No. 13, Oppo No. 91-210,282 (January 17, 2014) ("Parent Notice of Opposition"), and Opposer's Notice of Opposition, Docket No. 1, Oppo. No.

MPJP does not identify which facts in the pleadings it relies upon to support its motion, but instead makes only unsupported, conclusory statements of opinion. A motion for judgment on the pleadings is based solely on a review of the factual allegations in the pleadings, wherein all of Opposer's factual allegations must be accepted as true. *Kraft Group LLC v. Harpole*, 90 USPQ2d 1837, 1840 (TTAB 2009), *dismissed in favor of a cancellation proceeding*, slip op. Opposition No. 91185033 (TTAB September 5, 2011); *Media Online Inc. v. El Clasificado Inc.*, 88 USPQ2d 1285, 1288 (TTAB 2008); TBMP § 504.02. During this review, the Board may only grant a judgment on the pleadings where, on the facts as deemed admitted, there is no genuine issues of material fact to be resolved, and the moving party is entitled to judgment as a matter of law. *Id.* Here, even a cursory review of the pleadings clearly shows that all material factual allegations are in dispute (by Applicant's own extensive contestation of the facts, *See Answers*), with the only undisputed allegations dealing with the ownership of and the contents of the PTO records for the respective marks. *Answers*, ¶¶ 3-6 (in part), 14. Based on this alone, it is clear that whether Applicant is entitled to judgment as a matter of law cannot be determined solely through a review of the pleadings, and the instant Motion must be denied.<sup>3</sup>

Additionally, Applicant's reliance on *Kellogg Co. v. Pack'em Enterprises, Inc.*, 14 USPQ2d 1545 (TTAB 1990), upon which the entire MPJP is based, is misplaced, as the *Kellogg*

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91-214,537 (January 17, 2014) ("Child Notice of Opposition") (hereinafter both collectively referred to as the "Complaints"), as well as their respective answers. *See Applicant's Answer to Parent Notice of Opposition*, Docket No. 16, *Oppo. No. 91-210,282* (February 26, 2014); *Applicant's Answer to Child Notice of Opposition*, Docket No. 5, *Oppo. No. 91-214,537* (February 26, 2014) (hereinafter collectively referred to as the "Answers"). Both the Parent Notice of Opposition and the Child Notice of Opposition, as well as their respective Answers, are identical with exception of the mark being opposed (and affirmative defenses in the answer for *Oppo. No. 91-210,282* that are not of consequence for the instant motion). Hereinafter, Opposer's reference to any specific allegation in the Complaints or the Answers should be interpreted to mean that the allegation is identical in both unless otherwise noted.

<sup>3</sup> "A judgment on the pleadings may be granted only where, on the facts as deemed admitted, there is no genuine issue of material fact to be resolved" *Kraft Group LLC v. Harpole*, 90 USPQ2d 1837, 1840 (TTAB 2009), *dismissed in favor of a cancellation proceeding*, slip op. Opposition No. 91195033 (TTAB September 5, 2011) (emphasis added).

case presents a standard for a motion for summary judgment, not a motion for judgment on the pleadings.<sup>4</sup>

Applicant's MPJP is not well-founded, serves only to delay the proceedings, shirks Applicant's clear discovery obligations and imposes unnecessary burdens on Opposer and the Board. As such, Opposer respectfully requests that the MPJP be denied in its entirety.

### **COMPLETE STATEMENT OF RELEVANT FACTS**

Applicant's account of the facts attempt to confuse and prejudice the Board by being incomplete. Applicant completely ignores the fact that Opposer served Requests for Admission, Requests for Production and Interrogatories on Applicant, and that Applicant waited until late in the evening the day before Applicant's discovery responses were due to file this MPJP. A complete statement of the relevant facts is below.

Opposer filed a Notice of Opposition against Appln. No. 85/860,816 on April 17, 2013, which was assigned No. 91-210,282. (Parent Opposition, Docket No. 1). The original deadline to answer was May 27, 2013. (*Id.*, Docket No. 2). After a 90-day extension of time (requested by Applicant without consent of Opposer), (*Id.*, Docket No. 4), Applicant, without any objections, filed its Answer on August 25, 2013. (*Id.*, Docket No. 6). Applicant then moved for a further 60-day extension of time of all dates (again without Opposer's consent) on September 22, 2013, (*Id.*, Docket No. 7), which was granted by the Board on October 30, 2013, (*Id.*, Docket No. 8), and the new deadline for the mandatory discovery conference was set as November 22, 2013. *Id.* Applicant's current counsel made his appearance on November 5, 2013 and immediately requested Board participation for the discovery conference, which was granted. (*Id.*, Docket No.

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<sup>4</sup> Of course, Applicant does not indicate how or why it believes the circumstances in this case to be similar to those in *Kellogg Co. v. Pack'em Enterprises, Inc.*; Applicant instead just relies on an unsubstantiated conclusory statement that they are similar despite the fact that *Pack'em* specifically deals with Motions for Summary Judgment rather than a Motion for Judgment on the Pleadings.

11). The parties held a discovery conference, with Board participation on November 22, 2013, which the Board summarized on November 24, 2013. (*Id.*, Docket No. 12). Although settlement discussions had not been fruitful, Opposer had made settlement proposals that went ignored by Applicant. *Id.*

On January 17, 2014, Opposer filed a Motion to Amend and an Amended Notice of Opposition to further clarify its prior rights. (Parent Opposition, Docket No. 13). On the same day, Opposer also filed a Notice of Opposition against Appln. No. 85/969,820, which was accorded No. 91-214,537. (Child Opposition, Docket No. 1), and shortly thereafter, on January 21, 2014, Opposer moved to consolidate both the Parent and the Child Oppositions. (Parent Opposition, Docket No. 14; Child Opposition, Docket No. 4). Applicant did not oppose the consolidation, and timely filed answers (again, without any objection) in both oppositions on February 26, 2014. (Parent Opposition, Docket No. 16; Child Opposition, Docket No. 5). The matters were consolidated on March 13, 2014, and dates were reset accordingly. (Parent Opposition, Docket No. 17). The parties mutually agreed that due to the identical nature of the Child Opposition and the Parent Opposition, and the fact that no changes had occurred since the previous discovery conference, the prior-held discovery conference satisfied the reset discovery conference requirement. (Halpert Decl. ¶ 4). Opposer timely served its initial disclosures on Applicant on April 28, 2014. (Halpert Decl. ¶ 5).<sup>5</sup> Shortly after filing its disclosures, on May 23, 2014, Opposer served Applicant with discovery requests in the form of document requests, interrogatories, and requests for admission via first class mail. (Halpert Decl. ¶ 6).

Applicant's responses to Opposer's discovery requests were due by June 27, 2014. (Halpert Decl. ¶ 6). Rather than respond to the discovery requests as required, however,

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<sup>5</sup> Applicant did not serve any initial disclosures by the April 28, 2014 deadline, but rather served them two months late, simultaneously with the instant MPJP. (Halpert Decl. ¶ 5).

Applicant filed the instant MPJP late in the evening of June 26, 2014 – one day before the discovery deadline. (Parent Opposition, Docket No. 18). No suspension order has been issued that would relieve Applicant of its discovery obligations, and to date, Applicant has yet to respond to Opposer’s discovery requests.<sup>6</sup> (Halpert Decl. ¶ 7).

It is of utmost importance to note that Applicant’s attorney has made it his practice to shirk discovery obligations by filing motions for judgment on the pleadings on the eve of the discovery response deadline.<sup>7</sup> This serial practice is clearly solely to avoid responding to discovery and should not be condoned. Accordingly, in addition to requesting that Applicant’s MPJP be denied, Opposer respectfully requests that in light of this continuing practice by Applicant’s attorney, that Applicant be ordered to respond to the discovery requests, and that the Requests to Admit be deemed admitted in accordance with Fed. R. Civ. P. 36(a)(3) and TBMP § 407.03(a).

## **ARGUMENT**

### **A. The Relevant Factual Allegations in Opposer’s Opposition Must be Accepted as True for Purposes of this Motion.**

A motion for judgment on the pleadings is a test solely of the undisputed facts appearing in all of the pleadings, supplemented by any facts of which the Board will take judicial notice. *Kraft Group LLC v. Harpole*, 90 USPQ2d at 1840; *Ava Enterprises Inc. v. P.A.C. Trading Group, Inc.*, 86 USPQ2d 1659, 1660 (TTAB 2008). For purposes of the motion, all well-pleaded factual allegations of the nonmoving party (in this case, Opposer) must be accepted as true, while

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<sup>6</sup> Applicant’s MPJP is not dispositive as the Complaints and Answers clearly raise issues of fact. Even if the instant MPJP were dispositive, the TBMP clearly states that “filing . . . a potentially dispositive motion does not, in and of itself, operate to suspend a case; until the Board issues its suspension order, all times continue to run.” TBMP § 510.03(a); *see also Super Bakery Inc. v. Benedict*, 96 USPQ2d 1134, 1136 (TTAB 2010); *Giant Food, Inc. v. Standard Terry Mills, Inc.*, 229 USPQ 955, 965 (TTAB 1986); TBMP § 510.03(a) nn.9, 11.

<sup>7</sup> *See Red Bull GmbH v. Jean Pierre Biane*, Oppo. No. 91-204,861, Docket No. 37 (April 21, 2014); *PepsiCo, Inc. v. Cocofina Ltd.*, Oppo No. 91-211,391, Docket No. 12 (May 22, 2014); *PEI Licensing, Inc. v. Kryos Guard, S.L.*, Oppo. No. 91-208,793, Docket Nos. 8-17 (2013).

those allegations of the moving party (Applicant) which have been denied are deemed false. *Id.* If, upon review of the pleadings, Opposer's Complaints raises issues of fact, which, if proved, would establish its entitlement to judgment, the motion for judgment on the pleadings must be denied. *Baroid Drilling Fluids Inc. v. Sun Drilling Products*, 24 USPQ2d 1048, 1049 (TTAB 1992); *International Telephone and Telegraph Corp. v. International Mobile Machines Corp.*, 218 USPQ 1024, 1026 (TTAB 1983).

When deeming all factual allegations in the Complaints as true – as must be done in accordance with the rules – it becomes apparent that Opposer would be entitled to judgment if these issues of fact are proven. As Applicant has limited the MPJP to only a comparison of the marks (and has voluntarily conceded every other *DuPont* factor in Opposer's favor, including Opposer's fame, *see* MPJP at 5), only the following facts alleged in Opposer's Complaint are relevant for the purposes of the MPJP and need be addressed at this time:

Opposer Red Bull is now and has for many years been engaged in the development, marketing, advertising, distribution and sale of various products and services including, among others, beverages, energy drinks, sports drinks, soft drinks, various items of clothing, including but not limited to shirts, pants, jackets, hats and other clothing items, as well as restaurant and café services, and various other products and services related or complementary thereto. Complaint at ¶ 1.

Opposer Red Bull is the owner of the corporate name, trade name and trademark RED BULL, having used said name, mark and logo continuously in interstate commerce on and in connection with beverages, energy drinks, sports drinks, soft drinks, various items of clothing, including but not limited to shirts, pants, jackets, hats and other clothing items, as well as restaurant and café services, and various other products and services related or complementary thereto since long prior to the July 18, 2012 filing date of Applicant's Bull Logo Mark, opposed herein.<sup>8</sup> *Id.* at ¶ 2

Opposer Red Bull is the owner of the valid and subsisting U.S. Trademark Reg. No. 2,946,045 for the Bull Logo Mark, which was registered on the principal register on May 3, 2005, and currently covers, in relevant part, "*non-alcoholic beverages, namely energy drinks and hypertonic drinks,*" in Int'l Class 32. A combined Declaration of Use and Incontestability under Sec 8 & 15 of the Trademark Act was acknowledged and accepted in relation to, *inter alia*, the relevant goods above on January 13, 2011. A copy of the TSDR record for this registration showing the current status and title is attached hereto in Exhibit 1. *Id.* at ¶ 3.

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<sup>8</sup> Throughout the recitation of relevant allegations in the Complaint, please note that "Applicant's Bull Logo Mark" reads as "Applicant's STOCKMARKET and Bull Logo Mark" in the Child Opposition, and "Appln. No. 85/680,816" reads as "Appln. No. 85/969,820" in the Child Opposition.



Opposer Red Bull is the owner of the valid and subsisting U.S. Trademark Reg. No. 3,051,994 for the Bull Logo Mark, which was registered on the principal register on January 31, 2006, and currently covers, in relevant part, “*apparatus for refrigerating, namely, refrigerators, refrigerated drink cabinets,*” in Int’l Class 11, “*clothing, namely, shirts, t-shirts, sweat shirts, blouses, hats, caps; activewear, namely, shirts, hats, caps and visors; bandannas, neckerchiefs, sweaters; resort wear, namely, t-shirts,*” in Int’l Class 25, and “*non-alcoholic beverages, namely, soft drinks; sports drinks; energy drinks,*” in Int’l Class 32. A Declaration of Use under Sec 8 of the Trademark Act was accepted in relation to, *inter alia*, the relevant goods above on March 23, 2012. A Declaration of Incontestability under Sec 15 of the Trademark Act was accepted in relation to, *inter alia*, the relevant goods above on December 2, 2012. A copy of the TSDR record for this registration showing the current status and title is attached hereto in Exhibit 2. *Id.* at ¶4.

Opposer Red Bull is the owner of the valid and subsisting U.S. Trademark Reg. No. 3,561,283 for the RED BULL & Bull Logo Mark, which was registered on the principal register on January 13, 2009, and currently covers, in relevant part, “*apparatus for refrigerating, namely, refrigerating display cabinets, refrigerating or freezing showcases; refrigerators, refrigerated drinks cabinets,*” in Int’l Class 11, “*clothing and headgear, namely, T-shirts, blouses, sweaters, tops, jackets, vests, anoraks, wind-resistant jackets, aprons, caps, hats, headbands, braces, belts, money-belts, sun visors; sportswear, namely, shirts, pants, polo shirts, sweat shirts and sweat pants, hooded shirts and sweat shirts, shorts blouses, skirts, jumpers, jackets and coats; footwear for sport,*” in Int’l Class 25, “*non-alcoholic beverages, namely, sports drinks, energy drinks, and soft drinks,*” in Int’l Class 32, “*Alcoholic beverages, namely, vodka,*” in Int’l Class 33, and “*Services for providing food and drinks, namely, bar services, cafes, cafeterias, snack bars, restaurants, self-service restaurants, food and drink catering,*” in Int’l Class 43. A copy of the TSDR record for this registration showing the current status and title is attached hereto in Exhibit 3. *Id.* at ¶ 5.

Opposer Red Bull is the owner of the valid and subsisting U.S. Trademark Reg. No. 4,031,959 for the RED BULL ARENA & Device Mark, which was registered on the principal register on September 27, 2011, and currently covers, in relevant part, “*Providing food, beverage and souvenir stands and concessions stands featuring food, beverages, clothing, sporting equipment and souvenirs in connection with, at the location of and during the sports competitions, concerts and other events at a sports and entertainment events stadium,*” in Int’l Class 35, and “*Arena services, namely, providing stadium facilities for sports events, cultural exhibitions and musical concerts,*” in Int’l Class 43. A copy of the TSDR record for this registration showing the current status and title is attached hereto in Exhibit 4. *Id.* at ¶ 6.

Opposer Red Bull is also the owner of various common law rights for the trademarks RED BULL, RED BULL & Two Bulls Logo, Two Bulls Logo and (Single) Bull Logo, and other marks incorporating the word BULL, and/or the design of a bull or bovine animal for various goods and services, all of which are collectively referred to herein as Red Bull’s “**Red Bull and Bull Logo Marks**”. Complaint at ¶ 7.

Red Bull’s various **Red Bull and Bull Logo Marks**, all of which include the word BULL and/or the design of a bull, are and have become valuable assets of Opposer Red Bull, identifying its beverages, energy drinks, sports drinks, soft drinks, various items of clothing, as well as restaurant and café services, and various other products and services related of Red Bull, and distinguishing Red Bull’s products and services from the products and services of others. *Id.* at ¶ 8.

Opposer Red Bull’s **Red Bull and Bull Logo Marks** as described herein are extensively advertised in the United States and throughout the world, and have appeared on or in relation to products, product packaging, point-of-sale displays and other promotional materials for products sold, offered and advertised, and/or have been used in connection with various services, sporting events, contests, exhibitions and cultural events advertised, offered, conducted and/or promoted in the United States and throughout the world. *Id.* at ¶ 9.

In 2012 alone, sales of RED BULL beverages exceeded 5.2 billion units, with over 1.9 billion units sold in the United States. As a result of the enormous success and sales of Red Bull's beverages and of the extensive advertising and promotion of the **Red Bull and Bull Logo Marks** on products such as beverages, energy drinks, sports drinks, soft drinks, various items of clothing, including but not limited to shirts, pants, jackets, hats and other clothing items and services such as restaurant and café services, and various other products and services related or complementary thereto in the United States and throughout the world, the **Red Bull and Bull Logo Marks** have become and are famous marks, and are recognized in the United States and elsewhere as such. *Id.* at ¶ 10.

The depictions of a bull, as used and registered by Opposer typically show a bull in a charging, angry, aggressive, fighting, and/or "mad" pose, posture, and expression. *Id.* at ¶ 11.

Opposer Red Bull's well-known energy drink and beverage products are often referred to as "the Bull" or "a Bull", with consumers asking for "a Bull". *Id.* at ¶ 13.

Applicant has used **Applicant's Bull Logo Mark** in the color red, the primary color used by Oppose (and the image equivalent of Opposer's corporate name and house mark) on or in connection with the well-known and famous **Red Bull and Bull Logo Marks**. This highlights Applicant's direct reference to Opposer and Opposer's well-known and famous **Red Bull and Bull Logo Marks**. *Id.* at ¶ 15.

**Applicant's Bull Logo Mark** so resembles Opposer Red Bull's **RED BULL and Bull Logo Marks** as to be likely, when applied to the goods and services of Appln. No. 85/680,816, to cause confusion, mistake or deception among purchasers, users and the public, thereby damaging Red Bull. *Id.* at ¶ 17.

Simultaneous use of **Applicant's Bull Logo Mark** on the goods and services set forth in Appln. No. 85/680,816 and Opposer Red Bull's **RED BULL and Bull Logo Marks** on its goods and related services as set forth above is likely to cause confusion, misstate or deception among purchasers, users, and the public, thereby damaging Red Bull. *Id.* at ¶ 19.

Use by Applicant of **Applicant's Bull Logo Mark** on the goods and set forth in Appln. 85/680,816, is likely to lead to the mistake belief that Applicant's products are sponsored by, affiliated with, approved by or otherwise emanate from Opposer Red Bull, thereby damaging Red Bull. *Id.* at ¶ 20.

The above listed facts are necessarily deemed admitted for the purposes of this motion.

Deeming Opposer's factual allegations above as true, Applicant has failed to show that there are no issues of material facts in regard to the similarities between Red Bull's RED BULL and Bull Logo Marks and Applicant's Bull Logo Marks, and Applicant's MPJP must be denied.

**B. Opposer's Notice of Opposition Raises Issues of Fact, Which, If Proved, Would Establish Opposer's Entitlement to Judgment**

Applicant has emphasized that its MPJP focuses solely on the first *DuPont* factor; whether the marks of Appln. Nos. 85/680,816 and 85/969,820 are confusingly similar in appearance, sound, connotation, and commercial impression to Opposer's RED BULL and Bull

Logo Marks. Applicant's MPJP does not examine the facts of pleadings at all and only describes its own opinion of the elements of the marks, baldly concluding that Applicant's Marks and Red Bull's RED BULL and Bull Logo Marks are different in appearance, sound, connotation, and commercial impression. However, a look at the relevant factual allegations of the Complaint – all of which are deemed admitted for the purposes of this motion – show that the respective marks are similar, such that Opposer is entitled to judgment. Based on this, and taking all well-pleaded facts in the Complaint as true, Applicant has not established that a lack of material fact exists and the MPJP should be denied.

*1. Based on the Pleadings, There is a Material Issue of Fact Regarding the Similarities between Applicant's Marks and Red Bull's RED BULL and Bull Logo Marks.*

As stated in the pleadings – and therefore deemed true – Opposer is the owner of the admittedly famous RED BULL and Bull Logo Marks. Complaint at ¶¶ 3-7. Opposer's pleaded registrations consist of a variety of Double Bull and Single Bull Devices in different configurations. Further, as stated in the pleadings and therefore true, Opposer is the owner of a variety of prior common law rights for these bull devices without additional words or designs.<sup>9</sup> Red Bull's RED BULL and Bull Logo Marks all contain the term BULL and/or depict a bull in a charging or aggressive posture, Complaint at ¶ 3-7, 11, and Opposer's products are often referred to as “a Bull” or “the Bull”, *Id.* at ¶ 13 – indicating that the bull designs and the word BULL (when used), are the dominant portions of Opposer's RED BULL and Bull Logo Marks. Finally, as stated in the pleadings, Applicant uses its marks in the color red, the primary color used by Opposer on and in connection with its famous RED BULL and Bull Logo Marks, such that Applicant's Marks become the image equivalent of Opposer's name – a “red bull”. Due to

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<sup>9</sup> Again, Applicant implicitly accepted the descriptions of Opposer's common law design marks are sufficiently descriptive (in conjunction with the entire Complaint) through its action of filing not just one, but three separate answers to the matters of this Consolidated Opposition without once indicating any issue or ambiguity with the Complaints or filing any Motion for a More Definite Statement.

Opposer's renown and fame, the overlap in goods and services directed through the identical trade channels to identical purchasers, *see* MPJP at 5, these above facts (taken as true) show that confusion is likely and Opposer is entitled to judgment. As such, the MPJP must be denied.

Applicant's argument, while emphasizing the need to look at the marks as a whole, essentially states that its own assessment of the dominant portions of the respective marks (based on its own opinion and not based, in any way, on the pleadings) concludes, in its own opinion, that the marks are so different that there is no issue of material fact. However, based on the pleadings themselves (as is necessary for a Motion for Judgment on the Pleadings) the dominant portion of Opposer's RED BULL and Bull Logo Marks is the charging bull, Complaint at ¶¶ 3-7, 11, 13. Given the long-term continuous use of these Bull Designs in Red Bull's RED BULL and Bull Logo Marks in the United States for many years prior to the filing to either of Applicant's Marks, *Id.* at ¶¶ 1-7 and their admitted fame, MPJP at 5, Red Bull's RED BULL and Bull Logo Marks and other bull marks that are substantially similar charging bull designs for identical goods and services, are dominant over minor additional elements placed around the Bull design (such as the "swirl" in Applicant's Marks). The additional matter in the parties' respective marks does not eliminate the substantial similarity of the dominant aspects.

Based on the above, Opposer's well-pleaded facts in the Complaint, deemed admitted, show that Applicant's Marks are similar to Red Bull's RED BULL and Bull Logo Marks, such that, if proven, Opposer would be entitled to judgment as a matter of law. As such, Applicant has failed to show that no issue of material fact exists, and Applicant's MPJP must be denied.

**C. Questions of Fact Remain as to the Weight Afforded to Other Relevant DuPont Factors.**

Applicant has conceded all *DuPont* factors aside from the first, and arbitrarily concludes that "the single *DuPont* factor of the dissimilarity of the [parties'] marks in their entireties

substantially outweighs any other relevant factors and is dispositive of the issue of likelihood of confusion.” MPJP at 7. The apportionment of weight to be attributed to each *DuPont* factor is not a decision for Applicant to make, but rather is reserved for the Board, and the Board alone, in consideration of all the facts. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1362, 177 USPQ 563, 568 (CCPA 1973) (Reasonable men may differ as to the *weight* to give specific evidentiary elements . . . it is the duty of the Board to find, upon consideration of all the evidence, whether or not confusion appears likely.).

It is of note that Applicant has conceded, in addition to other *DuPont* factors, the fame of Opposer’s RED BULL and Bull Logo Marks, and the identical nature of the goods and services associated thereto. MPJP at 5. A finding that Opposer’s RED BULL and Bull Logo Marks are famous and that the goods and services are identical (or even closely related) strongly favor Opposer and the conclusion that confusion is likely.<sup>10</sup> It is up to the Board to determine the weight to be afforded to these other relevant *DuPont* factors, making this matter unsuitable for summary disposition on the pleadings alone. Determining whether Applicant’s Marks are similar to Opposer’s RED BULL and Bull Logo Marks must be made in the context of the other likelihood of confusion factors, not by simply waiving off these factors, as Applicant would have the Board do. *See Bridgestone Ams. Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 1337, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012). The question is not whether an opposition can be dismissed solely on one *DuPont* factor, but whether, upon considering all other factors weighing in favor of the non-moving party, the one factor could be dispositive. *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375 (Fed. Cir. 1998).

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<sup>10</sup> “Fame of an opposer’s mark or marks, if it exists, plays a ‘dominant role in the process of balancing the du Pont factors,’” and “[f]amous marks . . . enjoy a wide latitude of legal protection.” *Recot Inc. v. Becton*, 214 F.3d 1322, 1328, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (internal citations omitted).

While one factor may be dispositive, weight must be apportioned (by the Board, not the Applicant) in light of all other relevant *DuPont* factors, such as the similarity of goods and services, channels of trade, and the fame of Opposer's RED BULL and Bull Logo Marks. *In re Shell Oil Co.*, 992 F.2d 1204, 1206, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993). Factual determinations on all of these factors, and the weight given thereto by the Board, remain contested and cannot be made at this stage.

### **CONCLUSION**

For the foregoing reasons, by taking Opposer's relevant allegations as true (as is required under the rules when determining a motion for judgment on the pleadings), the Complaint clearly raises issues of fact, which, if proved, would establish Opposer's entitlement to judgment. On this basis, Applicant's MPJP should accordingly be denied. Additionally, Opposer respectfully requests that Applicant be ordered to respond to the previously served discovery requests, and that the Requests to Admit be deemed admitted.

Date: July 11, 2014

Respectfully submitted,  
RED BULL GMBH  
By: /Martin R. Greenstein/  
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Attorneys for Opposer

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **OPPOSER'S OPPOSITION TO APPLICANT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS** is being served on July 11, 2014, by first class mail, postage prepaid on Applicant's Correspondent of Record at the Correspondent's address of record below, with courtesy copy via email to [Paulo@patelalmeida.com](mailto:Paulo@patelalmeida.com) and [Alex@patelalmeida.com](mailto:Alex@patelalmeida.com):

Paulo A. de Almeida  
Patel & Almeida, P.C.  
16830 Ventura Blvd, Suite 360  
Encino, CA 91436

/Leah Z. Halpert/  
Leah Z. Halpert

	)	<b>Consolidated Matter:</b>	<b>91-210,282</b>
<b>RED BULL GMBH,</b>	)	Opposition No. 91-210,282 (Parent)	
	)	Opposition No. 91-214,537 (Child)	
<b>Opposer,</b>	)		
	)	<b>Marks:</b>	
<b>v.</b>	)	<b>Bull and Swirl Design</b> (#85/680,816)	
	)	<b>STOCKMARKET &amp; Bull Design</b>	
<b>STOCKMARKET BURGER, INC.,</b>	)	(#85/969,820)	
	)	<b>Serial Nos.:</b>	
<b>Applicant.</b>	)	<b>85/680,816</b>	
	)	<b>85/969,820</b>	

I, Leah Z. Halpert, hereby declare under penalty of perjury of the laws of the United States of America, that the following is true and correct:

- 1**



by the prior-held discovery conference on this matter on November 22, 2014, and no changes had occurred since that time. As such, the parties mutually agreed that the discovery conference obligation, reset by the consolidation, had been met.

5. Opposer timely served its initial disclosures on Applicant on April 28, 2014. Applicant did not serve any initial disclosures by the April 28, 2014 deadline, but instead served them two months late on June 26, 2014 simultaneously with the filing of the Motion for Partial Judgment on the Pleadings.
6. Opposer served Applicant with discovery requests in the form of document requests, requests for admission and interrogatories via first class mail on May 23, 2014. Applicant's responses were due on June 27, 2014.
7. To date, Applicant has not provided responses to Opposer's discovery requests.

Executed this 11<sup>th</sup> day of July 2014 at San Jose, CA

/Leah Z. Halpert/  
Leah Z. Halpert

#### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **DECLARATION OF LEAH Z. HALPERT IN SUPPORT OF OPPOSER'S OPPOSITION TO APPLICANT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS** is being served on July 11, 2014, by first class mail, postage prepaid on Applicant's Correspondent of Record at the Correspondent's address of record below, with courtesy copy via email to [Paulo@patelalmeida.com](mailto:Paulo@patelalmeida.com) and [Alex@patelalmeida.com](mailto:Alex@patelalmeida.com):

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